Supreme Court, U.S.
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No. 04-1478

In the Supreme Court of the United States

JOHN ERIC THOMAS, *et ux,* HEATHER THOMAS,
Petitioners,

v.

THE CITY OF CHATTANOOGA, TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT CITY OF CHATTANOOGA'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether the Sixth Circuit correctly held that plaintiffs' expert testimony did not create a factual question for trial on the existence of a policy, custom, or practice and properly affirmed the Summary Judgment granted to the municipal defendant by the District Court after considering *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993) and *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978).

2. Whether the Sixth Circuit opinion conflicts with the decisions of another United States Court of Appeals to the extent that there is a compelling reason to grant the Petition.

LIST OF ALL PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE STATEMENT

The caption of the case contains the names of all the parties involved in this matter.

The City of Chattanooga is a municipal corporation and has no parent companies or non-wholly owned subsidiaries required to be disclosed under Supreme Court Rule 29.6.

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The opinion of the United States Court of Appeals for the Sixth Circuit was recommended for full-text publication. It is reported at *Thomas, et ux. v. City of Chattanooga,* 398 F.3d 426 (6th Cir. 2005).

STATEMENT OF JURISDICTION

Respondent, City of Chattanooga, adopts and incorporates the Statements of Jurisdiction set forth in the Petition for Writ of Certiorari filed by Petitioners, JOHN ERIC THOMAS, *et ux,* HEATHER THOMAS.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Respondent City of Chattanooga adopts and incorporates the Constitutional provisions, treaties, statutes, ordinances and regulations involved set forth in the Petition for Writ of Certiorari filed by Petitioners, JOHN ERIC THOMAS, *et ux,* HEATHER THOMAS.

STATEMENT OF THE CASE

The City of Chattanooga was originally sued for $25,000,000.00 in compensatory and punitive damages in the Eastern District of Tennessee on August 5, 2002 by Attorney Robert J. Shockey, representing the plaintiffs John Eric Thomas and wife, Heather Thomas. The original complaint asserted claims arising out of the Due Process Clause of the Fourteenth Amendment to the United States Constitution under 42 U.S.C. § 1983. The complaint asserted that the actions of Officer Abernathy ("Abernathy") in a single police

shooting incident resulted in the deprivation of civil rights of Eric Thomas to be free from excessive and unreasonable force, to be deprived of liberty without due process, and to be free from summary punishment. Abernathy was never sued as a party defendant in any capacity. The original complaint asserted that the City of Chattanooga was liable for the wrongful acts of Abernathy by virtue of the doctrine of *respondeat superior*.

A Scheduling Order was entered on November 29, 2002 following the conference held on November 25, 2002. The Scheduling Order made specific deadlines for Expert Disclosures and provided for a *Daubert* hearing to determine the admissibility of expert testimony provided that motions were filed by certain deadlines. The Scheduling Order further established dispositive motion deadlines and joinder deadlines. Plaintiffs did not file any expert disclosures on or before April 11, 2003 as required by the Scheduling Order. Appellee filed a motion to extend its deadline for expert disclosures and dispositive motions on May 14, 2003 and also filed limited expert disclosures on May 15, 2003. Appellee's expert disclosure deadline was extended until June 15, 2003 and its dispositive motion deadline was extended until July 11, 2003 by orders entered May 20 & 22, 2003.

On June 10, 2003, Appellants filed a motion to amend the complaint. On June 16, 2003, Appellants filed an expert statement of Phillip L. Davidson. On June 22, 2003, the Magistrate granted Appellants' motion to extend the time for taking of depositions until September 1, 2003 and granted defendant's motion to extend the *Daubert* motion filing deadline until September 1, 2003 and granted Appellants' motion to amend the complaint. An amended complaint was filed on July 10, 2003. The amended complaint contains a new paragraph 12 and 13 which reads as follows:

12. Officer Abernathy's wrongful and tortuous conduct, as described hereinabove, was in violation of T.C.A. 39-11-620, in that he failed to identify himself as a police officer prior to opening fire, failed to warn, failed to exhaust all other reasonable means of apprehension, and had no probable cause to believe that Eric Thomas posed a threat of serious bodily injury or had committed a felony involving the infliction or threatened infliction of serious bodily injury, and in that Eric Thomas was not fleeing at the time in question.

13. The City of Chattanooga is liable to plaintiffs by virtue of having, within its Police Department, a practice, policy, custom or usage of unlawful excessive force by Police Officers.

No additional parties were added or requested to be added in the amended complaint. On July 11, 2003, defendant City of Chattanooga filed its motion for judgment on the pleadings and/or for summary judgment with supporting affidavits and portions of the deposition of Abernathy. On July 31, 2003, Appellants filed a memorandum in opposition to defendant's summary judgment motion with an affidavit of Davidson and Shockey. An Affidavit of Davidson was filed on August 11, 2003. Portions of the deposition of Davidson taken on August 19, 2003 were filed on August 29, 2003 by defendant City of Chattanooga in support of its motions. A later supplemental affidavit of Davidson was filed on September 2, 2003 following his deposition. A supplemental affidavit of Charles Russell ("Russell") was filed by Appellee on September 8, 2003. The entire deposition of Janet Crumley ("Crumley") was filed on September 10, 2003.

A memorandum with order and judgment dismissing this case against the City of Chattanooga with prejudice was entered by Chief Judge R. Allan Edgar on September 16, 2003. A notice of appeal was filed by plaintiffs on September 19, 2003. The Sixth Circuit rendered its Judgment affirming the decision of the District Court on February 9, 2005. A Petition was filed with this Court on May 5, 2005. This Court has granted an extension until July 8, 2005 within which to file a Brief in Opposition to the Petition. This brief is timely filed by the City of Chattanooga in accordance with the Order entered by this Court.

STATEMENT OF THE FACTS

On May 28, 2002, Officer Reginald Abernathy responded to a dispatched domestic disorder call sometime after 12:30 a.m. at 4805 Hal Drive in Chattanooga, Tennessee. Abernathy was advised by dispatch that someone was riding up and down in a truck, hollering and screaming and burning rubber in the street. Abernathy heard loud screaming when he was directly in front of the driveway leading to the Thomas' house. Abernathy observed a man and a woman arguing in the kitchen and two rifles were observed on the counter top in the kitchen. The man was observed with a handgun in each of his hands. Eventually, after observations by Officer Abernathy over several seconds of the activities in the kitchen, Abernathy determined that the woman's life was in imminent danger. Abernathy eventually fired at the man's left arm and shot multiple continuous rounds through the glass window of the kitchen door. After the shooting incident, Abernathy remained outside the residence until his sergeant arrived at the house and John Eric Thomas was eventually discovered injured in the home.

The record clearly established that Abernathy had never shot any other individual in his work for the Chattanooga Police Department for more than ten years prior to this incident. Abernathy had received video training in the use of deadly force from the Chattanooga Police Department while in the Police Academy. Abernathy had no founded Internal Affairs complaints or disciplinary action for any matter in his 10 years of employment. Abernathy testified that he had received training from the Chattanooga Police Department to announce himself as a police officer before using deadly force, but Abernathy stated that he did not think that there was enough time to announce himself as a police officer on the evening in question, based upon the circumstances of the dangerous condition which he observed.

Despite initially relying on the theory of *respondeat superior* in the initial Complaint, petitioners eventually submitted multiple affidavits of Phillip L. Davidson, an expert witness. Davidson relied upon court records and an affidavit from petitioner's attorney that 45 lawsuits alleging use of force against the Chattanooga Police Department had been filed in the United States District Court between July of 1994 and July of 2003. Davidson opined that based upon his experience with other cities similar to this one, the number of formal cases alleging use of excessive force by police officers indicates that written regulations to the contrary notwithstanding, at the time and place in question, Chattanooga Police Department uniformed officers acted within an informal, unwritten policy, practice or custom wherein the unlawful use of force-the use of excessive force -was tolerated.

After submitting his affidavit, Davidson was deposed on August 19, 2003. In that deposition, Davidson stated that he based his opinion in his July 29th Affidavit on Robert

Shockey's affidavit, Exhibits filed in Support of Defendant's Motion for Summary Judgment, the Deposition of Officer Abernathy, and other cases similar to this one. When Davidson was questioned further about any specific cases he based his opinion on, the following exchange took place:

Noblett: Okay. What other cases have you had that were similar to this, sir?

Davidson: In terms of -- when I say similar to this, no case is really similar. We're talking about cases where there have been a lot of lawsuits filed over a period of time against a department. Of course, I looked at the internal affairs recommendation, too.

Noblett: Okay, sir. One of the things that was questioned to me in your affidavit dated July 29th, were your references to experience with other cities and cases similar to this one; I was trying to find out what other cities those might be.

Davidson: Well, I'm sort of between a rock and a hard space here. I can't discuss or reveal the names of clients I've had. Okay.

Noblett: All right, sir.

Davidson: But I can tell you I have filed numerous lawsuits and civil rights cases where one of the allegations have been that there is policy custom and usage of the city in terms of excessive force.

Noblett: So are you trying to rely on your experience as an attorney?

Davidson: That as well as the case that I've actually previously testified in this case as having testified as an expert.

Davidson was asked if he had any information that the Chattanooga Police Department knew before the shooting incident between Officer Abernathy and Eric Thomas that Mr. Abernathy would improperly shoot someone. Davidson answered:

> No. All police departments, that's why they have regulations, that's why they have general orders, because there's an awareness that officers can and in fact do sometimes violate departmental -- violate use of force policy, and can commit excessive use of force. That's why they have these general orders, in hope to control that type of behavior, or at least they can get some guidelines out there.

Davidson was questioned whether any police officer for the City ever told him there was some sort of culture which allowed excessive force to occur and he replied "No." Davidson was then asked:

Noblett: Do you have any evidence that the city of Chattanooga had any policy or practice of not conducting investigations when their officer had a civil citizen complaint against them?

Davidson: With a citizen complaint, I don't have any information that they didn't do that,

because this is the only information that was provided.

Noblett: All right, sir. And I'm talking as to when you gave your affidavit in this case on August the 8th.

Davidson: Right.

Davidson was further questioned about an August 8, 2003 affidavit which was filed by plaintiffs in this case . In that affidavit, Davidson states:

> Subsequent to preparing and executing my affidavit dated July 29, 2003, I have reviewed certain photocopies of some but less than all of the complaints and civil cover sheets of the cases referred to in Mr. Shockey's affidavit of July 29, 2003....I have also reviewed Defendant's Response to the Plaintiffs' Request for Admissions dated June 30, 2003, Defendant's Answers to Plaintiffs' Second Set of Interrogatories and Third Set of Request for Production dated June 30, 2003, the documents produced by the defendant subsequent to the deposition of Captain Mike Williams, and the Defendant's Response to Plaintiffs' Second Request for Production of Documents. The documents exhibited to this latter discovery response – a statistical summary of excessive force complaints made against the Chattanooga Police Department from December of 1988 through and including the present time – are made Exhibit 1 to this affidavit.

Davidson later concluded that:

> Based upon my experience with other cities and cases similar to this one, the number of formal civil cases alleging use of excessive force by police officers filed against the City of Chattanooga, and more particularly the Chattanooga Police Department's internal records regarding use of excessive force complaints from citizens and the internal "resolution" of those complaints indicates that written regulations to the contrary notwithstanding, at the time and place in question, the Chattanooga Police Department uniformed officers acted within an informal unwritten policy, practice or custom wherein the unlawful use of force – the use of excessive force – was tolerated and officially condoned.

The statistical summary of excessive force complaints referred to by Davidson in his August 8, 2003 affidavit simply lists the Internal Affairs investigation number, the type of complaint, and the disposition of the complaint which was requested and provided during discovery. Davidson admitted in his deposition that he did not remember how many of the listed Internal Affairs complaints involved use of deadly force. He admitted that he did not delineate any of his opinions based upon whether or not a complaint involved deadly force. Davidson admitted that he had not reviewed any of the information as to the rulings or verdicts in any of the complaints and civil cover sheets from the Eastern District of Tennessee at the time of his deposition. In addition, Davidson admitted that he had not seen any of the internal investigations or the Internal Affairs reports regarding any complaints listed in the Internal Affairs listings prior to giving his August 8, 2003 affidavit.

In a fourth supplemental affidavit dated August 28, 2003 following his deposition, Davidson concludes that Crumley's omission of evidence allegedly showing that Abernathy gave no warning leads to his conclusion that it was a customary practice to forward inaccurate reports. Crumley explained in her deposition that it is not her role to perform an investigation but to review the investigating officer's report, which in this case was Sergeant Charles Russell. Sergeant Russell concluded in his report that Abernathy did give a verbal warning. Crumley also testified that at the time of her recommendation, she did not have access to Abernathy's affidavit nor the statements of Mrs. Thomas who had refused to speak with Internal Affairs.

The District Court and the Sixth Circuit extensively reviewed all of the contradictory and conclusory statements made by Phillip L. Davidson before determining that his conclusions did not satisfy the requirements of the *Federal Rules of Evidence*, *Daubert* or *Monell*.

REASONS WHY THE PETITION SHOULD BE DENIED

None of the criteria set forth in Supreme Court Rule 10 that could establish a "compelling reason" to grant the petition is present here. Petitioners have failed to identify any way in which the Sixth Circuit's decision either:

(1) conflicts with the decision of another United States Court of Appeals,

(2) decides an important federal question in a way that conflicts with the decision by a state court of last resort,

(3) so far departs from the accepted and usual course of judicial proceedings to justify an exercise of this Court's supervisory power,

(4) decides an important question of federal law previously undecided by the Court, or,

(5) conflicts with relevant decisions of this Court.

Supreme Court Rule 10 specifically provides that a petition for writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The petition for writ of certiorari to this Court in this case is nothing more that a claim by Petitioners that the District Circuit improperly granted summary judgment to the municipal defendant and the Sixth Circuit erred in affirming it because it misapplied properly stated rules of law. It is asserted that the Sixth Circuit either misapplied its own precedent or ruled in a manner with conflicts or *Daubert* or *Monell* or other Courts of Appeals which have interpreted them. Petitioners misinterpret the clear language of this Court in *Daubert* which was correctly interpreted by the Sixth Circuit at page 11a of Appendix A to petitioners Brief. This case is not suitable for review because the decision of the Sixth Circuit below does not conflict with the interpretations of *Daubert* in other United States Courts of Appeals nor with other relevant decisions of this Court. This case is also not suitable for review because the Sixth Circuit did not misapply any rule of law which is otherwise appropriate for review based on Supreme Court Rule 10.

I. The Sixth Circuit Correctly Held That Plaintiffs' Expert Testimony Did Not Create a Factual Question for Trial on the Existence of a Policy, Custom, or Practice and Properly Affirmed the Summary Judgment Granted to the Municipal Defendant by the District Court after Considering *Daubert* and *Monell*.

The Sixth Circuit properly affirmed the summary judgment granted to the City of Chattanooga by the District Court after fully reviewing *Daubert*. The District Court made no initial *Daubert* ruling due to its finding that summary judgment was appropriate under *Monell* because any offered opinions were "wholly conclusory." The Sixth Circuit clearly found that *Daubert* does not require a court to make a credibility determination of expert testimony. *Daubert* does require that any expert witness be able to substantiate his opinion where necessary based upon some facts in the record under Rule 56 when summary judgment determinations have to be made by the Court. The Sixth Circuit properly found that being an expert does not lessen the burden one has in rebutting a motion for summary judgment. In fact "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached...and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it. '" *See* Fed. R. Evid. 702 advisory committee's note; and *Joiner v. General Electric Co.*, 78 F.3d 524, 530 (11th Cir. 1996); *Cook v. American S.S. Co.*, 53 F.3d 733, 738 (6th Cir. 1995); and *Berry v. Detroit*, 25 F.3d 1342, 1349-1350 (6th Cir. 1994).

The Sixth Circuit properly reviewed *Daubert* reliability factors which were adopted by this Court in its opinion before determining that Davidson's conclusions that the City of

Chattanooga must have an unwritten policy of condoning excessive force because of the mere number of complaints previously filed against it, was insufficient to create a genuine issue of material fact on which a jury could reasonable find that such a policy exists. The Sixth Circuit reviewed *Daubert* and *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed. 2d 238 (1999) before coming to the conclusion that Davidson's affidavits simply did not provide any rationale for his conclusions. None of Davidson's affidavits reviewed by the Sixth Circuit are included with the Petition for consideration by this Court.

The Sixth Circuit after reviewing all statements by the plaintiff's expert, Davidson, found that it could not simply take the expert's "word for it" without some identifiable basis for a conclusion. The Sixth Circuit found that Davidson himself stated that "there's no brightline or rule" regarding how many complaints would be excessive against any police department. The Sixth Circuit found that this admission suggested that an expert would need to conduct a more qualitative analysis to develop a conclusion. However, the affidavits nor deposition testimony of Davidson established that Davidson did not conduct such an analysis, and instead in his deposition he merely mentioned a few cases where the courts have let the jury determine whether the municipality had an unwritten illegal policy. Under *Daubert*, statistical evidence must be prepared in a reliable and statistically sound way. *Adams v. Ameritech Services, Inc.* 231 F.3d 414, 425 (7th Cir. 2000). The Sixth Circuit properly found that Davidson did not establish any qualitative analysis of any other case he considered and how they were similar to the present case by any testimony or affidavit which was before that Court. As such, it is respectfully submitted that Davidson did not establish proof of any unconstitutional policy, custom, or practice adopted by any municipal

policymaker which would warrant a trial on the merits. The Sixth Circuit and the District Court below properly found that municipal liability at least since *Monell* requires more than a simple *respondeat superior* standard.

The Sixth Circuit properly found that Davidson's affidavits and deposition testimony in this case did not establish any policy of deliberate indifference resulting from a single shooting incidence by an officer or the Chattanooga Police Department. The Sixth Circuit appropriately considered that municipal liability requires proof of much more than the analysis offered by plaintiff's expert in this record. The record and proof submitted by plaintiff's did not exhibit any clear and persistent pattern of illegal activity by the Chattanooga Police Department. The Sixth Circuit properly found that deliberate indifference "does not mean a collection of sloppy, or even reckless oversights; it means evidence showing an obvious, deliberate indifference" to the alleged violations. *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 407, 117 S.Ct. 1382, 137 L.Ed. 2d 626 (1997).

Because Davidson failed to provide any explanation for his reliance on the mere number of excessive force complaints against the Police Department established the existence of any unconstitutional policy, custom or practice by the City of Chattanooga, the Sixth Circuit properly found that the only basis for his opinion that such an unconstitutional practice or custom existed was reduced to the fact's of this case alone. Simply because one person is shot when that person is perceived by the officer to be threatening his wife with two loaded weapons does not establish any unconstitutional policy, custom or practice of a municipal defendant. Since the Sixth Circuit properly applied the decisions from this Court in *Daubert* and *Monell*, this decision does not conflict with any

relevant decision of this Court and this petition should be denied.

II. The Sixth Circuit opinion does not conflict with the decisions of other United States Court of Appeals to the extent that there is a compelling reason to grant the Petition.

The petitioners assert that a conflict exists within the Sixth Circuit between *First Tenn. Bank Nat. Ass'n v. Barrato,* 268 F.3d 319, 331 (2001) and the instant case, *Thomas v. City of Chattanooga*. Both of these cases recognized the gatekeeping functions of the District Court and the holdings in *Daubert* and *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999). Conflicts of decisions within the Sixth Circuit may clearly be resolved by the Court below and do not establish any "compelling reason" to grant this petition under Supreme Court Rule 10. There is no material difference in the legal analysis used by the Sixth Circuit in either of these cases to determine whether there was an adequate basis for the admission of expert testimony based on *Daubert* standards. The bottom line in both Sixth Circuit cases is that the District Court's decision on admission of testimony is subject to review on an abuse of discretion standard.

There is no conflict between the Sixth Circuit decision in this case and the Fourth Circuit decision in *Binakonsky v. Ford Motor Co.,* 133 F.3d 281 , 290 (1998). In the Fourth Circuit that court correctly determined that Dr. Korella performed an autopsy. As such he was merely a fact witness not an expert witness. The Fourth Circuit properly found that *Daubert* was inapplicable to fact witnesses who are not offering expert conclusions. Petitioners have made no argument in this case that Davidson was not attempting to provide expert testimony.

Nor is there any conflict between the Sixth Circuit decision in this case and the Ninth Circuit decision in *White v. Form Motor Co.*, 312 F.3d 998 (2002). The Ninth Circuit explicitly recognized the holdings of this court in *Daubert* and in *Kumho* much like the Sixth Circuit decision below. The Ninth Circuit in *White* also recognized that the gatekeeping role of the District Judge extends to all forms of expert testimony and in assessing reliability, depending upon the nature of the issue, the expert's particular expertise, and the subject of his testimony.

Finally, the Eighth Circuit opinion in *U.S. v. Rouse*, 100 F.3d 560, 567 (1996) arose from the testimony of a psychologist relating to the concept of "suggestibility" or "altered memory state" affecting the credibility of child sexual abuse victims. *Rouse* was decided before *Kumho Tire,* but its analysis was not inconsistent therewith. Unlike the case at bar, the Eight Circuit found that there was ample support for the testimony in the psychological literature. Davidson, the so-called expert in the case at bar could not point to any scientific literature which supported his proffered testimony. In *Rouse* the psychologist did not attempt to testify about any ultimate issue in the case, whereas in the case before this Court Davidson proffered testimony which was directed at ultimate issues. Davidson's proffered testimony was properly discounted as wholly conclusory by the District Court and by the Sixth Circuit after *Daubert* review , because the testimony was not supported by any scientific literature or any other method of verification.

There is simply no conflict between the Eight Circuit opinion in *White* and the Sixth Circuit decision below in this case. Because petitioners have not provided any compelling reason to grant this petition it should be denied pursuant to Supreme Court Rule 10.

CONCLUSION

Petitioners have failed to identify any compelling reason to grant the Petition. The cases cited by petitioners are not indicative of any conflict between the ruling of the Sixth Circuit and the decision of other United States Courts of Appeals or with this Court concerning the requirements of *Daubert* and *Monell*. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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